

**Exhibit 3 to**  
**Declaration of Mark C. Mao**  
**ISO Plaintiffs' Unopposed**  
**Motion for Final Approval of**  
**Class Action Settlement**

UNITED STATES DISTRICT COURT **CERTIFIED COPY**

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

CHASOM BROWN, WILLIAM BYATT,)	<b>Motions Hearing</b>
JEREMY DAVIS, CHRISTOPHER )	
CASTILLO, and MONIQUE )	
TRUJILLO, individually and )	
on behalf of all similarly )	
situated, )	
)	
Plaintiffs, )	
)	
vs. )	NO. C 20-03664 YGR (SVK)
)	
GOOGLE LLC, )	Pages 1 - 113
)	
Defendant. )	Oakland, California
_____ )	Friday, May 12, 2023

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

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(Appearances continued next page)

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1           **MS. TREBICKA:** But that is not what's at issue here.

2           That controlled expert experiment does not prove the point  
3           that this data, this private browsing data, is at all times  
4           actually linkable to an identity. And it's not, Your Honor.

5           And on that point, very instructive and comprehensive is  
6           our Exhibit 62, which is the testimony of Dr. Glenn Berntson,  
7           who was a witness in Your Honor's courtroom in the related  
8           *Calhoun* case in the Rule 56(e) hearing where he explained very  
9           carefully why that is not true, why it is true that Google  
10          does not link this private browsing data to identities or  
11          Google accounts. And it's also true that it cannot routinely  
12          be done.

13          Yes, it may be done under some hypothetical circumstances  
14          with sufficient data if all the circumstances are right, but  
15          it cannot be done on a routine basis and certainly the reason  
16          for that is because Google not only has policies and practices  
17          that forbid it -- and that's our facts 63 through 66, Your  
18          Honor. But also because Google backs up its practices and  
19          policies with actual technical safeguards against it. And  
20          it's all explained in -- in detail in this Exhibit 62 that I  
21          pointed Your Honor to.

22          Your Honor, I'd also like to take us back to the  
23          complaint, which is plaintiff's biggest problem, because at the  
24          start of the case, what they alleged, pages of -- and pages of  
25          it, in their complaint is that Google links routinely and

1 always private browsing data to their identities.

2 We challenged it at the motion to dismiss set -- stage and  
3 said that's not plausible. And at the hearing, plaintiffs  
4 counsel said, oh, no, we will prove it. We will prove that  
5 that's what you do, Google. And that is the February 25, 2021  
6 hearing on page 29 and 30.

7 And that very promise that plaintiffs will indeed prove  
8 that Google links private browsing data to identities was then  
9 memorialized in Judge Koh's order, Docket 113 at -- on  
10 page 38, where she said it -- it passes the pleadings, they've  
11 stated a claim for intrusion upon privacy because they have  
12 sufficiently alleged, seven pages of it, that Google links  
13 private browsing data to identities.

14 This is -- this is the shrinking case, Your Honor. Now  
15 what they're left with -- we heard that it's not really  
16 disputed that Google does not do that. Now what we're left  
17 is, well, in some circumstances, Google could perhaps do that.  
18 That is not sufficient, Your Honor.

19 And after two and a half years of scorched-earth  
20 discovery, which of most of it you've been spared the disputes  
21 of, Your Honor.

22 **THE COURT:** Yeah, and you all don't come out very  
23 clean on that front, do you, because you didn't produce things  
24 and you've been sanctioned multiple times, so let's -- the  
25 scorched earth could be your fault.

1 But keep going.

2 **MS. TREBICKA:** Sure, Your Honor. I would like to  
3 address the sanctions, though, because --

4 **THE COURT:** No, you shouldn't. You should keep  
5 going.

6 **MS. TREBICKA:** Okay. That's fine.

7 17,000 megabytes of data we produced, private browsing and  
8 other data, for them to find even a single instance where  
9 Google links private browsing data to -- to users' identities,  
10 and they could not.

11 And, Your Honor, these facts, which are, as we established  
12 here today, not genuinely disputed -- in fact, not disputed at  
13 all -- cannot give rise to a concrete injury that will clear  
14 the Article III standing.

15 And any other conclusion would be a departure from Ninth  
16 Circuit precedent on this because where the Ninth Circuit has  
17 found standing, it's always been in circumstances where this  
18 type of data was linked to an identity. It was identifiable  
19 data. That's the *In re Facebook Tracking* case. That's the  
20 *Campbell vs. Facebook* case.

21 And the Ninth Circuit, by contrast, has not found standing  
22 where the data was not linked to someone's identity.

23 **THE COURT:** All right. A response.

24 **MS. BONN:** Thank you, Your Honor.

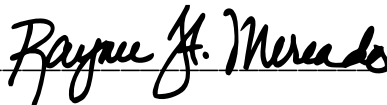
25 I'd like to --

(Proceedings were concluded at 3:35 P.M.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Saturday, June 3, 2023